

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOE MARSH, JR.	:	DETERMINATION
	:	DTA NO. 806490
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1982 through 1984.	:	

Petitioner Joe Marsh, Jr., 742 Wyandot Street, Findlay, Ohio 45840 filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 through 1984.

On February 25, 1992 and March 5, 1992, respectively, petitioner and the Division of Taxation, represented by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel), consented to have the controversy determined on submission of documents without hearing, with all briefs due by June 22, 1992.¹ After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner carried his burden of demonstrating entitlement to certain business deductions under Tax Law § 612(a).

FINDINGS OF FACT

On June 25, 1986, the Division of Taxation ("Division") issued to petitioner, Joe Marsh, Jr., at 80 Harbor Road, Oyster Bay, New York 11771, two statements of personal income tax audit changes, one statement for the years 1982 and 1983 and the other statement for 1984. The statements indicated that New York State personal income tax returns were not filed for income

¹The parties have not submitted any briefs in this case.

earned at the Roosevelt Raceway in the amounts of \$39,594.00 in 1982, \$40,675.00 in 1983 and \$56,895.00 in 1984. Allowing a standard deduction and one exemption, the Division calculated tax due in the amounts of \$2,989.34 for 1982, \$3,097.50 for 1983 and \$4,719.50 for 1984, plus interest and penalties for the total amounts of \$5,658.75 (1982), \$5,254.38 (1983) and \$7,185.48 (1984).

Thereafter, the Division issued to petitioner two notices of deficiency, dated September 8, 1986. One notice asserted additional tax due for 1982 and 1983 in the amount of \$6,086.84, plus penalty and interest, for the total amount of \$11,043.87. Another notice asserted additional tax due for 1984 in the amount of \$4,719.50, plus interest and penalty, in the total amount of \$7,273.08.

On January 14, 1988, the Division received from petitioner 1982, 1983 and 1984 resident income tax returns with the mailing address of 742 Wyandot Avenue, Findlay, Ohio 45840. Attached to each of the returns was a Schedule C, Form 1040, with respect to profit or loss from business or profession. The forms indicated petitioner's main business activity as harness racing with the business name and address of Joe Marsh Jr. Stables, 742 Wyandot, Findlay, Ohio 45840.

On the 1982 return, petitioner claimed total business income in the amount of \$118,790.65, with deductions and expenses that totaled \$105,666.25 as follows:

Advertising	\$ 315.18
Bank Service Charge	217.21
Car and Truck Expenses	2,302.11
Dues and Publications	74.50
Freight	2,468.00
Insurance	5,125.00
Interest on business indebtedness	4,402.03
Laundry and cleaning	1,320.00
Legal and professional services	1,463.93
Office supplies and postage	428.89
Rent on business property	7,320.00
Repairs	4,000.00
Taxes	1,547.20
Travel and entertainment	2,395.39
Utilities and telephone	4,717.42
Blacksmith	5,365.89
Veterinary	2,835.60
Feed and Hay	12,634.78

Sublet labor	33,600.00
Parking and tolls	1,200.00
Harness equipment	1,131.00
Licenses	321.00
Leases	4,247.12
Paddock	3,600.00
Colors	1,134.00
Workmen's compensation	1,500.00

Petitioner, therefore, reported \$13,124.40 (\$118,790.65 - \$105,666.25) as his total income in 1982 with \$417.00 as tax due.

On the 1983 tax return, petitioner reported gross business income as \$93,577.22, less total deductions of \$91,465.47, for a net profit of \$2,111.75, which amount he reported as his only income in 1983 with no tax due. On the 1984 tax return, petitioner reported \$19,594.00 as his business income (\$184,260.68 gross income less \$164,666.57 deductions) with tax due of \$949.00. On both returns the categories of business expenses were similar to the deductions he reported on the 1982 return (Finding of Fact "4").

In lieu of a conciliation conference, petitioner opted to have the matter decided by correspondence. On September 9, 1988, the conferee issued a Conciliation Order sustaining the statutory notices. However, the conferee noted that payments of \$838.81 and \$1,593.11 had been received for 1982 and 1984, respectively.

On December 12, 1988, the Division received a petition signed by petitioner and Margie A. Bassitt, his representative. On the front page of the petition where the printed form states "Petitioner hereby petitions for", the petitioner checked the box "other", next to which he wrote the notation "review expenses and deductions". Petitioner alleged the following errors on the part of the Division:

"These years were filed upon receipt of forms to do so - as all taxes had been paid to the State of Ohio. This is said to have been done in error. We would like to try to prove this assessment is in excess of amount actually owed."

By answer dated February 25, 1991, the Division denied the allegations in the petition and affirmatively stated the following:

"during the years 1982, 1983 and 1984, petitioner maintained a permanent place of abode in the State of New York and spent more than 183 days of the year in the State of New York . . .

"that during the years 1982, 1983 and 1984 the petitioner was a domiciliary of New York State . . .

"that during the years at issue petitioner was a 'resident individual' as defined in section 605(b) of the Tax Law; and Further States that pursuant to section 601 of the tax Law, petitioner is liable for the payment of personal income tax for the years at issue . . .

"that petitioner failed to file New York State Personal Income Tax returns for the years at issue . . .

"that on September 8, 1986 the Division of Taxation properly issued to petitioner Notices of Deficiency A8606294071 and A8606294061 for the years at issue . . .

"that the burden of proof is upon the petitioner to prove that the determination of the Division of Taxation is improper and/or erroneous."

Neither party has submitted a brief or letter articulating an argument with respect to the pleadings.

CONCLUSIONS OF LAW

A. Notwithstanding the allegations contained in the Division's answer, it is apparent that petitioner is not contesting the tax assessed on the ground that he was not a domiciliary or statutory resident of New York State. Petitioner filed resident income tax returns, albeit late returns, for the years in question. In his petition, petitioner appears to argue that he incorrectly paid all taxes to the State of Ohio and seeks to prove that the tax assessments are excessive because of the business expenses and deductions claimed on Schedule C on his late-filed tax returns for 1982 through 1984.

B. Inasmuch as a presumption of correctness attaches to notices of deficiency that are issued under the authority of the Tax Law, the taxpayer has the burden of proving the incorrectness of the deficiency (Tax Law § 689[e]; Matter of Schneier, Tax Appeals Tribunal, November 9, 1989, citing Matter of Tivolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175). Petitioner has not carried his burden of demonstrating his entitlement to the deductions claimed on Schedule C of his tax returns or to a credit with respect to taxes he allegedly paid to the State of Ohio.

Under Tax Law § 612(a), the adjusted gross income of a New York resident is Federal

adjusted gross income, with certain modifications not applicable in this case. Section 62(1) of the Internal Revenue Code ("IRC") defines the adjusted gross income as an individual's gross income minus certain deductions. Among the deductions permitted are deductions for expenses which are "ordinary and necessary" for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income (IRC § 212[1], [2]). The taxpayer has the double burden of (1) demonstrating entitlement to the deduction and (2) substantiating the amount of the deduction (see, Tax Law § 658[a]; 20 NYCRR former 152.1, renum 20 NYCRR 158.1; Matter of Fusco, Tax Appeals Tribunal, March 23, 1989; Matter of Schneier, supra). The failure of the taxpayer to prove the exact amount of the deduction does not preclude an allowance for the deduction claimed; however, where no substantiation is provided, no allowance is required (see, Matter of Schneier, supra; cf., Matter of Coleman, Tax Appeals Tribunal, May 18, 1989).

Here, petitioner presents no argument or evidence, other than the late-filed State tax returns, describing in any detail the nature of his business income or justifying his entitlement to the alleged business deductions claimed on the tax returns. In any event, even if petitioner were entitled to the deductions as "ordinary and necessary" business expenses, he nonetheless presented no evidence to substantiate these expenses. Absent such substantiation, petitioner failed to rebut the presumption of correctness of the two notices of deficiency (see, Matter of Fusco, supra; Matter of Schneier, supra).²

²It should be noted that the amount of gross income upon which the Division calculated petitioner's tax due was substantially less than the amount he actually reported on the late-filed tax returns (compare, Findings of Fact "1", "4" and "5").

C. The petition of Joe Marsh, Jr. is denied and the two notices of deficiency, dated September 8, 1986, are sustained except as adjusted by the conciliation conferee (see, Finding of Fact "6").

DATED: Troy, New York
February 18, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE